

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

In re:

GIGA WATT INC,  
Debtor

CASE NO. 18-03197-FPC7

United States Bankruptcy Court  
Eastern District of Washington  
ADV. PROC. NO. 20-80031-FPC

MARK D. WALDRON,  
Plaintiff,

v.

PERKINS COIE LLP, LOWELL  
NESS, *Perkins Coie LLP*, GIGA  
WATT PTE. LTD., ANDREY  
KUZENNY, GIGA WATT PROJECT,  
Defendants.

TRANSCRIPT OF HEARING ON  
DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY,  
PLAINTIFF'S MOTION FOR DETERMINATION THAT PROCEEDING IS CORE,  
PLAINTIFF'S MOTION TO STRIKE JURY DEMAND,  
CONTINUED SCHEDULING CONFERENCE,  
AND CONTINUED HEARING ON MOTION TO WITHDRAW THE REFERENCE  
IN THE ADVERSARY PROCEEDING  
BEFORE THE HONORABLE FREDERICK P. CORBIT  
MARCH 25, 2021

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19 Proceedings recorded by electronic sound recordings, transcript produced by  
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1 CLERK: Good afternoon. We have the Honorable Frederick P. Corbit presiding. This is In  
2 Re: Waldron versus Perkins Coie et al, Adversary Number 20-80031. What is before the  
3 Court today is Defendant's Motion to Compel Arbitration and Stay, Plaintiff's Motion for  
4 Determination that Proceeding is Core, Plaintiff's Motion to Strike Jury Demand, Continued  
5 Scheduling Conference, and Continued Hearing on Motion to Withdraw the Reference.  
6 Present, we have Pamela Egan, attorney for the Plaintiff.

7 PAMELA EGAN: Good afternoon, Your Honor.

8 CLERK: Thank you. Mark Waldron, the Plaintiff. Mr. Waldron is there. Okay, and in  
9 addition, we have Ralph Cromwell, attorney for Defendants Perkins Coie.

10 RALPH CROMWELL: Good afternoon, Your Honor.

11 CLERK: [inaudible] Mr. Cromwell, we have Jofrey McWilliam.

12 JOFREY MCWILLIAM: Good afternoon, Your Honor.

13 CLERK: And co-counsel, John Munding.

14 JOHN MUNDING: Good afternoon, Your Honor.

15 CLERK: And joining by phone, Judge, we have Don Boyd, attorney for Defendant Kuzenny.

16 DON BOYD: Good afternoon, Your Honor.

17 CLERK: Thank you. This hearing is being recorded, and you may proceed.

18 JUDGE CORBIT: Good afternoon, Counsel, this is Judge Corbit. Conducting Zoom  
19 hearings is a little bit new. I teach classes by Zoom, and we've had some mediations by  
20 Zoom, and this one should I be sitting in my courtroom, should I have my robe on? I do have  
21 my tie on, so hopefully, I'm showing you enough respect. Good afternoon, everyone. Mr.  
22 Munding, I see you frequently in this Court. Mr. Waldron, you've been here. Mr. Egan,  
23 you've been here. And Mr. Cromwell, I believe I remember you from a case that you were  
24 involved with...in connection with the...oh no sound from me?

25 UNKNOWN: Yes, Your Honor.

26 JUDGE CORBIT: Mr. Cromwell, can you hear me, okay?

27 RALPH CROMWELL: Yes, I can, Your Honor.

28 JUDGE CORBIT: Okay, Mr. Waldron...everybody else seems to be able to hear me. I'm not

1 sure...we'll let Mr. Waldron work on his sound system here for a second. Okay. I'm  
2 wondering, Madam Clerk, if you could shoot an email to Mr. Waldron, I'm wondering if he  
3 called in on the AT&T line.

4 CLERK: I'm going to send it right now.

5 JUDGE CORBIT: Ms. Egan, do you have his cell number? Would that be...

6 PAMELA EGAN: Yes, would you like me to call him, Your Honor?

7 JUDGE CORBIT: I think that would be good.

8 PAMELA EGAN: Okay, fine. Hold on please. [pause] Your Honor?

9 JUDGE CORBIT: Yes.

10 PAMELA EGAN: I reached Mr. Waldron, and he understands to call in on the AT&T line.

11 JUDGE CORBIT: Okay. Alright, thank you. We were just talking a little...making a little  
12 pleasantries. I think most everyone here, Mr. McWilliam, I'm not sure that I met you before,  
13 but everyone else has been in my courtroom before. Mr. Cromwell, am I correct I think it was  
14 in the Diocese, the malpractice case, that you represented the defendant law firm in that case?

15 RALPH CROMWELL: Yes, Your Honor, you're correct.

16 JUDGE CORBIT: Okay. And I didn't get to...I didn't get to decide that case because you all  
17 settled it, but it was certainly interesting, and I certainly did a lot of research beforehand. So  
18 I'll associate with you, Mr. Cromwell, complicated interesting cases. This case certainly is  
19 that. There are four matters percolating, three of them are set for argument today, the three  
20 that Madam Clerk called. The Motion to Compel Arbitration, the Motion to Strike the Jury  
21 Demand, and the Motion for Determination that the Proceeding is Core. The fourth issue  
22 percolating is the Motion to Withdraw the Reference, which this Court needs to respond on  
23 and give the information to the District Court when it's decided. But the first three of those  
24 matters are scheduled for argument today. I propose that we'll hear argument separately on  
25 the motions. So keep that mind and keep in mind that I've read all of your pleadings, all of  
26 the declarations, and have done some research on my own, looking at some of the cases  
27 dealing with the issues raised in your briefs. But the reason why we'll start with the Motion  
28 to Compel is that even though I may not rule on that motion today, I may take it under

1 advisement. If I take it under advisement, I will issue an opinion in a matter of weeks, not a  
2 matter of months. I know it's important, and I will work diligently to get it done. But if I  
3 grant the motion to compel arbitration, it really eliminates lots of the other issues. If it's  
4 going to be arbitrated in Singapore, we're not gonna have a jury trial in Eastern Washington.  
5 And the issue of whether or not the case is core is not an issue that may need to be decided,  
6 and similarly whether or not the reference is going to be withdrawn may become moot. So,  
7 the Motion to Arbitrate is the one that I'd like to hear from you on first, and it's the one that I  
8 intend to resolve first if I take matters under advisement. Now after the arbitration motion, I  
9 will hear from you on the Motion to Strike the Jury Demand. On this one, the order will be  
10 flipped, Ms. Egan will go first, that's her motion, and then I'll hear from Mr. Cromwell or his  
11 colleague. Again, you know, I don't plan to give you "x" number of minutes, but frankly I'm  
12 thinking arguments of five minutes are probably enough. Your briefing is...has all been  
13 consumed by me. And finally today, I would hear the argument on the Motion for the  
14 Determination that the Proceeding is Core. And the reason is if the Motion to Strike the Jury  
15 Demand is denied and the Defendant chooses...then has a right...the Court determines that the  
16 Defendant has a right to a jury trial, and if the Defendant does not consent to this Court trying  
17 that jury case, this Court can try...can handle a jury matter, but it has to...it needs the consent  
18 of the parties. So, if there is a right to a jury trial and the Defendant doesn't consent, then the  
19 case it's going to go to the District Court, and that in essence probably renders moot the  
20 Motion to Withdraw the Reference. So that's the order I perceive this. I'd be interested in  
21 how I've set up this waterfall. And on that issue only, Mr. Cromwell, do you...do you  
22 concur?

23 RALPH CROMWELL: I think it's a sensible, logical way to proceed. I'm a little worried  
24 about the five-minute limit. I planned on saying a little bit more, but I will try to shorten up  
25 what I had to say.

26 JUDGE CORBIT: Well, Mr. Cromwell, if you don't repeat yourself and it's interesting and  
27 on point, I'm not going to have my watch out, so.

28 RALPH CROMWELL: Alright, well, you stop me...you stop me for sure if it's not

1 interesting or if it's not on point.

2 JUDGE CORBIT: Alright. Ms. Egan, let me hear from you about the order that I propose to  
3 go through these matters.

4 PAMELA EGAN: Thank you, Your Honor. The Motion to Strike the Jury Demand and the  
5 Motion to Determine Core are also integrally relevant to the Motion to Withdraw the  
6 Reference. So if you don't mind, then I'll try...if I'm not interesting or on point, I expect to  
7 be interrupted. But I think that those arguments dovetail closely with request for withdrawal.  
8 And so I would expect that in my arguments on those points, I would be referring to the  
9 Motion to Withdraw the Reference. I understand that's decided by the District Court, but this  
10 Court can provide information, transmit information to the District Court on the motion so.

11 JUDGE CORBIT: I'll hear from you on that, that's fine. I understand that, and I don't mean  
12 to cut you off. Before I hear from the two of you on...and I think, Mr. Cromwell, looking at  
13 the emails, your co-counsel was going to handle one of the motions. Are you the one that will  
14 handle the arbitration motion?

15 RALPH CROMWELL: Yes, Your Honor.

16 JUDGE CORBIT: Okay. And before I hear from you and hear Ms. Egan's response to that,  
17 there are a few issues that I want to raise with you to make sure that you address in your oral  
18 argument. One of the issues that I'd like you to deal with is whether or not there's a  
19 reasonable relation to Singapore. Now, I'm looking at Mr. Cromwell's document. It's the  
20 Motion to Compel Arbitration at Docket Number 40 at Page 17, and I'm gonna quote Mr.  
21 Cromwell here. He says, "The fourth element is met because a party to the transaction is not  
22 a citizen of the United States, and there is a reasonable relation to Singapore." The question I  
23 have is, is that what you're actually arguing Mr. Cromwell that it's an "and"? That both of  
24 those elements have to be met? Or are you saying that if Giga Watt Singapore is not a citizen  
25 of the United States, that's enough? But in your brief, you have the "and". The other issue  
26 that I'd like both of you to address, and I'm going to quote now from the Perkins reply brief  
27 in connection with their Motion to Compel Arbitration, that's at Docket 46. I'm looking at  
28 Page 3 at Line 18. And I'm just going to read what you said Mr. Crowell. You said, "To

1 escape the consequences of his own allegations, much of the Trustee's oppositions suggest  
2 that he will abandon his current complaint and pursue a new theory." Maybe this is more for  
3 you to respond to Ms. Egan, but I would like you to address this. My concern is this, is that I  
4 want this case to move efficiently forward. If I resolve the issue on the current complaint, am  
5 I going to see a motion to amend the complaint and are we going to go through this again? I  
6 would like to know if the Trustee is going to amend the complaint. And if so, in making my  
7 decisions, I may want to get that done sooner rather than later, so then I can see what those  
8 issues are. In particular, I go through and in reading Ms. Egan's pleadings, I'm not sure if she  
9 used this word, but the impression I got was talking about Giga Watt Singapore being sort of  
10 a sham entity. If it is a sham entity and has no assets, does it really need to be a party in this  
11 lawsuit? We're talking about a escrow transaction as I understand this case, the white paper  
12 which was Perkins Coie record I know had the white paper. And then I know that Perkins  
13 Coie from the record did get money. And I know from an email that was submitted that  
14 Perkins Coie was concerned about holding onto that money, and eventually that money was  
15 released. And so if there was an escrow relationship and so forth and money...I know, Mr.  
16 Cromwell, I'm not making any findings, I'm just talking about the allegations that Perkins  
17 Coie should not have released that money when it did and as a consequence of that has some  
18 liability. That's just the allegation. If that's the case and it's...this matter is dealing with  
19 what Perkins Coie did and the money is gone and GW Singapore is not really there, do they  
20 need to be a party to this action? If they're not a party, that may affect the arbitration  
21 analysis. Now with respect to my questions, Mr. Cromwell, about the "and" and the other one  
22 before you start, if I was not...I don't expect to be interesting, but if I wasn't articulate, Mr.  
23 Cromwell, do you have any questions about my questions?

24 RALPH CROMWELL: I don't have any questions about your questions, Your Honor. I  
25 think I've got them there, but if I'm not addressing what you want to know, I'm sure you're  
26 gonna tell me.

27 JUDGE CORBIT: Well, is that my reputation? I am curious, and I do ask questions.

28 RALPH CROMWELL: No, that's not your reputation. I think that's my request because the

1 last thing I want to be doing is talking about something that is off-point from what you want  
2 to hear.

3 JUDGE CORBIT: Okay, thank you, sir. I'm not bashful about asking questions. And while  
4 I was Chief Judge of the 9th Circuit Bankruptcy Judges, this is something we had a roundtable  
5 where we discussed with judges the appropriateness of asking questions and the different  
6 styles of judges. I'm a...my style is to ask questions when I don't know. Ms. Egan, do you  
7 have any questions about my questions?

8 PAMELA EGAN: No, Your Honor.

9 JUDGE CORBIT: Okay. Alright, well so, I set the table. Mr. Cromwell, it's your client's  
10 motion. I'll hear from you first.

11 RALPH CROMWELL: Alright, Mr...alright, Your Honor, again for the record, I'm Ralph  
12 Cromwell, and I'm representing the Defendants in this matter. I want to just step back for a  
13 minute before I address your questions and provide a context that I think might be helpful the  
14 rest of the discussion. The other day, I started hunting through your bankruptcy docket  
15 looking for something, and I found it, I thought, in Document Number 753, Docket Number  
16 753, it's a very short pleading, it's an objection. But what I was interested in was not the  
17 pleading, I was interested in the signature block. It was signed by seventy-eight token  
18 holders, and what it...and it had contact information for them. And what I was interested in  
19 knowing is how many different countries are these people located in? And I quickly counted  
20 up twenty-three different countries and the United States. That's a total of twenty-four  
21 countries. Canada, the United Kingdom, Russia, Japan, Australia, Venezuela, Columbia,  
22 Romania, Italy, Finland, South Africa, France, The Netherlands, Spain, Slovenia, Hungary,  
23 Norway, Greece, Chile, Switzerland, Germany, Sweden, Brazil, and the United States. No  
24 one from the Eastern District of Washington, one person from the State of Washington in  
25 Bellingham, and people scattered all over the country and a handful of states, Florida, Texas,  
26 California. What is the point of this or why would I want to know that? Well, when you first  
27 hear about arbitration in Singapore, it seems a little startling like what? Arbitration where?  
28 Why would you agree to arbitration in Singapore? I think if you go back to the spring of 2017



1 when Cryptonomos and Giga Watt Singapore were putting this transaction together, and they  
2 were sitting there thinking about it, and they were going “you know we’re gonna sell these  
3 tokens to people literally all over the world. If something goes wrong what’s gonna happen?  
4 Are we going to be hauled into court in twenty-four different countries under twenty-four  
5 legal systems? Do we have to hire twenty-four different lawyers if there’s some sort of  
6 problem?” And what they eventually did is what a lot of people do in these international  
7 transactions, they said, “No, if something goes wrong we need some sort of understanding  
8 about how this is gonna get resolved in a somewhat hopefully efficient way.” And what they  
9 provided for was arbitration in Singapore under Singapore law in front of the Singapore  
10 International Arbitration Center. I think that’s a reasonable choice. Why is it a reasonable  
11 choice? First of all, a lot of the people who are buying these tokens are not in North America,  
12 they’re in Europe, they’re in Russia, they’re in India, they’re in Africa. And if you have to fly  
13 to some location for an arbitration, I would argue that Singapore, a major international city  
14 with good air connections, is at least as convenient for a lot of these people as, you know,  
15 somewhere in the United States. Second of all, Singapore law is derived from English  
16 Common Law just like U.S. law, some differences but many similarities, and the Singapore  
17 International Arbitration Center is a very well-known arbitration organization, very reputable,  
18 does these things day in and day out, you know, knows what they are doing. And in  
19 providing for arbitration in Singapore, I think these people made a reasonable choice, which if  
20 you look at the context in which they were making it, clearly has connections to international  
21 commerce, people all over the world. What is the connection to Singapore? Well, the  
22 complaint says that both Cryptonomos, which structured and managed the sale of the tokens  
23 was incorporated in Singapore. There’s a hyperlink to their incorporation documents. Giga  
24 Watt Singapore is allegedly incorporated in Singapore. There is a hyperlink to their  
25 documents. There’s a hyperlink to an email to Perkins Coie, where Perkins is given a street  
26 address in Singapore to send correspondence. There are wiring instructions to Perkins to a  
27 bank in Singapore, where the money out of the alleged escrow was sent. And I would argue  
28 that in addition if you choosing Singapore law, it’s reasonable to choose arbitration in

1 Singapore because presumably you're gonna get arbitrators who know Singapore law. So I  
2 think my...you know, is there a connection...your exact question, "Does it have to be a  
3 foreign citizen and a reasonable connection or is it just a foreign citizen?" My understanding  
4 is that it's just a foreign citizen. Ms...Jofrey McWilliams, please correct me if you think  
5 otherwise. But I think this is a transaction with strong international connections. These will  
6 sold to people all over the world by an entity that was at least located and banking in  
7 Singapore, incorporated in Singapore. I think that the prerequisites for application of the New  
8 York Convention are met. But even if they weren't, all that would happen is you would  
9 default to the Federal Arbitration Act, which is the body of law you're using under the New  
10 York Convention anyhow. Okay, second point. When I first heard about this case, I don't  
11 know a lot about escrow agreements. The only escrow agreement I've ever signed in my  
12 whole life is when I bought a house, and I went to an escrow agent's office, and the buyer and  
13 the seller sign a contract that appoints someone as an escrow agent and gives them directions.  
14 Get the money from the buyer, get the title from the seller, when you got the title recorded,  
15 give the seller the buyer's money. So when I heard this was an escrow case, the first thing I  
16 said is "Okay where's the escrow agreement? Let's see the directions." If Perkins allegedly  
17 breached this escrow, where's the escrow agreement? And the answer was there isn't one.  
18 And I said, "Well, what do you mean there isn't one? How can there not be an escrow  
19 agreement if this is an escrow case?" And the answer is there is no escrow agreement in the  
20 sense one would traditionally expect to see. And so it's like, alright, well so why is the  
21 Plaintiff saying there's...

22 JUDGE CORBIT: Okay, well let me ask a question here. An arbitration agreement is a  
23 contract and here, you know, we have these various versions of the token agreement, purchase  
24 agreements that I see that has the arbitration provision, but Perkins...okay whatever  
25 this...whether there was an escrow or not, we look at what happens. And we...do you have  
26 the white paper Perkins signed to announced that Perkins is going to hold money, and Perkins  
27 did hold money. Okay, and then gave the money to someone else. We know those things  
28 aren't disputed. So based on that, the point of saying there was an escrow agreement and

1 then...and that Perkins...and they say that Perkins didn't do what they were supposed to do,  
2 they're going to have to prove the contract. But the arbitration contract that everybody's  
3 looking at is the token agreement dealing with Giga Watt Singapore and what's happening  
4 there and those agreements. But we're talking here only about what Perkins did and what  
5 Perkins was supposed to do with holding those funds. Perkins didn't sign any arbitration  
6 agreement, and I don't see in dealing with the so called escrow agreement, whether it's  
7 unwritten or verbal or whatever it is, I don't see an agreement that those disputes are covered  
8 by any arbitration contract or maybe you could point me to those.

9 RALPH CROMWELL: Okay. I think I'm following you, and I'm not sure I can give you a  
10 short answer, but I will answer you. Because there is no arbitration agreement in the sense  
11 you would typically expect to see one, for example, if you bought a house. If you look at the  
12 complaint, what the complaint says and this is just what it says, you could go read it, it says,  
13 "the white paper referenced an escrow" but the white paper says that it creates no contractual  
14 obligations and then the complaint says "the Token Purchase Agreement has a statement  
15 something to effect that the terms and conditions of the tokens are as stated in the white paper  
16 and the complaint alleges that is an incorporation by reference of the escrow provision into  
17 the Token Purchase Agreements. There's no other escrow agreement but there is according to  
18 the complaint an escrow provision incorporated by reference into the Token Purchase  
19 Agreements." And then the complaint goes on to allege that the way that the Debtor was  
20 damaged was that Perkins breached the escrow provision in the Token Purchase Agreement.  
21 Perkins didn't sign the Token Purchase Agreement. The Debtor didn't sign the Token  
22 Purchase Agreement. The Debtor says "I'm a partner...I'm a partner of Giga Watt Singapore  
23 that is a signatory so I can assert their rights and I am liable for their misconduct and the harm  
24 they cause" and they say "Perkins didn't sign it but Perkins knew what it said". So the theory  
25 of the complaint is that the way that Perkins is liable to the Debtor is for Perkins' breach of an  
26 escrow provision that was incorporated by reference into the Token Purchase Agreement.  
27 You can look at Paragraph 26 of the complaint is one good place. So what Perkins is saying  
28 is "Okay there's no classic escrow agreement here, but what you're saying is there was an

1 escrow provision in the Token Purchase Agreement and when we, Perkins, let money out of  
2 our IOLTA trust account, you say that breached the escrow provision in the Token Purchase  
3 Agreement and made you, the Debtor, liable to the token purchasers”. That’s an argument  
4 that Perkins is liable for a breach of the Token Purchase Agreement. And our Motion to  
5 Compel Arbitration is “okay, fine” if you are saying “We, Perkins, are liable to you, the  
6 Debtor, for a breach of the Token Purchase Agreement”. Then guess what else in the Token  
7 Purchase Agreement? An arbitration provision that your partner, Giga Watt Singapore, put  
8 there because they didn’t want to be sued in twenty-four different countries. And you don’t  
9 get...if you’re suing us for a breach of the Token Purchase Agreement, you don’t get to pick  
10 and choose which provisions get enforced. You can’t just say “I want to enforce this one but  
11 not that one”. It’s equitable estoppel. If you are suing us for a breach of the Token Purchase  
12 Agreement, then you are equitably estopped to deny that we are entitled to demand  
13 arbitration. I hope I’m addressing what you were getting at there.

14 JUDGE CORBIT: You did.

15 RALPH CROMWELL: So that’s it in a nutshell. In a nutshell, we are saying there’s no  
16 toke...there’s no escrow agreement here. But Debtor, we understand your theory. Your  
17 theory is there was an escrow provision in the Token Purchase Agreement. You claim it was  
18 breached. You claim that we breached it by letting money out when we shouldn’t have.  
19 Okay, we let money out when we shouldn’t have, and you became liable for it. You are suing  
20 us for a breach of the Token Purchase Agreement, so equitable estoppel we want to arbitrate  
21 that...under that provision which says, “Any dispute arising from or relating to the Token  
22 Purchase Agreement” which you say contains this escrow clause, you know, that’s right down  
23 the middle of what would fall in an arbitration clause like that. You’re suing us for a breach  
24 of the Token Purchase Agreement. We want to arbitrate. And then you know, what is their  
25 response? Their response is “well there’s no proof that the Token Purchase Agreements were  
26 signed”. Well okay, if there’s no purchase...proof that the Token Purchase Agreements were  
27 signed, we can all go home right now. Because if they weren’t signed, you didn’t occur any  
28 liability for a breach of an escrow provision in there. There’s an argument this is absur...you

1 know, this is so broad, it could be applied in an absurd fashion. There's nothing absurd about  
2 saying, "if you claim we breached an escrow provision in the Token Purchase Agreement, we  
3 want to arbitration under an arbitration clause in the Token Purchase Agreement that covers  
4 any disputes regarding that agreement". There is a claim that there's no reasonable relation to  
5 Singapore, but you claim they're incorporated there. You claim that Cryptonomos is  
6 incorporated there. You hyperlinked to emails giving us a street address there and wiring  
7 instructions to a bank there, and the Token Purchase Agreement provides for application of  
8 Singapore law. Sounds like a connection to me. And then the last argument you get, which in  
9 some ways I think gets, you know, on a page count basis the most attention, is the idea that  
10 because we are in bankruptcy, you have discretion not to enforce arbitration. Even if there is  
11 a Token Purchase Agreement, and even if we are claiming a breach of it, and even if it does  
12 have an arbitration clause, and even if it's otherwise enforceable, you have discretion not to  
13 enforce the arbitration clause if that would under...you know, inherently undermine one of  
14 the fundamental purposes of the bankruptcy code. And the first step of the analysis...as I  
15 understand that argument, it's Congress passed the Arbitration Act, Congress passed the  
16 Bankruptcy Code, we have to assume that Congress doesn't want the Arbitration Act applied  
17 in a way that fundamentally undercuts the Bankruptcy Code. And we don't want the  
18 Bankruptcy Code applied in a way that fundamentally Arbitration Act. So is there something  
19 about arbitration of this particular case that is fundamentally inconsistent with the purposes of  
20 the Bankruptcy Code? And that analysis, developed through case law, is the first thing you  
21 ask is well okay is this adversary proceeding core or non-core? Which, you know, you want  
22 to address serially. But the analysis is is if it is non-code...excuse me, non-core, almost by  
23 definition application of enforcement of an arbitration clause could not be fundamentally  
24 inconsistent with the purposes of the bankruptcy act if we're not even talking about a core  
25 issue. And then the 9th Circuit goes on and says, "But even if it is core, the party resisting  
26 arbitration still has the burden of showing that enforcement of arbitration would be  
27 fundamentally inconsistent with the purposes of the Bankruptcy Code". And this is you know  
28 this whole non-core, core, non-core thing is complicated. But, you know, as I understand the

1 argument to shorten...I mean look, all of the conduct at issue is pre-petition. We are talking  
2 about sales of tokens in 2017 and an alleged escrow that was funded in the summer of 2017  
3 and money that was disbursed from escrow by Perkins Coie in the fall of 2017 or maybe in  
4 January or February of 2018. It's all pre-petition conduct. If a cause of action for breach of  
5 escrow rose, it arose at the very latest by February of 2018. Perkins Coie has not submitted a  
6 proof of claim. There is no counter-claim in our answer, and if you read our request for relief,  
7 we have not asked for any affirmative relief from the Debtor. So what is the argument that  
8 this is a core proceeding? It turns on the allegation that by asserting setoff as an affirmative  
9 defense, we transformed what was otherwise a non-core proceeding into a core proceeding.  
10 And my understanding of the law there, and I'm not a bankruptcy attorney, is that  
11 bankruptcy...but I'll take a shot at it, bankruptcy has a very special definition of "setoff" and  
12 they distinguish "setoff" from "recoupment". "Setoff" is where the claim that the Defendant  
13 is setting off against the Debtor arose in a transaction that is different than the transaction the  
14 Debtor is suing on. Whereas, "recoupment" is a claim that the Defendant is asserting against  
15 the Debtor in the same transaction that the Debtor is suing. And the important distinction is is  
16 that if the transaction is different, if the setoff is from a transaction that is different, it is  
17 treated as an independent claim against the Debtor subject to allowance or disallowance  
18 which makes it a core issue. In contrast, if the setoff defense arises from the same transaction  
19 that the Debtor is suing on, it is not treated as an independent claim. It is simply treated as an  
20 attempt to reduce the Debtor's damages, and there is no automatic stay, there is no application  
21 of 553, there is no transformation of the setoff defense into an independent claim, which is a  
22 core proceeding. And so, what are our setoff defenses here? We have two of them. One, it  
23 seems to be undisputed that this money that was wrongfully released from the escrow ended  
24 up from the Debtor. And so one of our setoff defenses is if you got the money, why are you  
25 suing us?

26 JUDGE CORBIT: Isn't...isn't that...as for that, isn't that about the half the money, not all  
27 the money?

28 RALPH CROMWELL: My understanding...so this is a...it is at least half the money. But

1 the Trustee's complaint at Page 9, like Line 11, don't hold me to that but we cite it in our  
2 brief, the Trustee's complaint contains a hyperlink to a letter that the Debtor wrote to the FCC  
3 in August of 2018. The FCC had a whole bunch of questions for the Debtor. And one of the  
4 questions was "Where'd the money go? All this money you got from selling tokens where  
5 did it go?" And what the Debtor's answer to the FCC is "It was used for construction." Well  
6 the only...the only person doing any construction was the Debtor. And then if you look at the  
7 complaint, the complaint says that Giga Watt Singapore filed a claim in the bankruptcy,  
8 claiming \$26 million loan to the Debtors. So it appears to me that what happened is that all of  
9 the money went to the Debtor, perhaps some of it as a loan, but a loan that hasn't been repaid.  
10 And so whether we're right or wrong about the facts, I mean, if we litigate this lawsuit, I  
11 guess we'll find out if we're right or wrong about the facts. But in theory, what's our setoff  
12 defense? Our theory in setoff defense is "Why are you suing us if you got the money and kept  
13 it and used it for construction?" Or said differently, "Why does Perkins have to give you  
14 money a second time that you say you weren't supposed to get a first time?" Or said  
15 differently "If you have to give back money that you weren't supposed to get, why were you  
16 damaged?" But the important issue for this core, non-core, do you have discretion to deny  
17 arbitration is is that defense arising from the same transaction or a different transaction than is  
18 the subject of the Trustee's action? And we would say it's clearly the same transaction. The  
19 transaction involved in the Trustee's claim is that there was money in escrow and "Perkins  
20 you let it out before you were supposed to" and our defense is "yeah but we let it out to you".  
21 That's the same transaction. So under this distinction between setoff and recoupment that the  
22 9th Circuit follows, where if it's the same transaction, it's recoupment. And if it's  
23 recoupment, it's not treated as an independent claim subject to the claims allowance process.  
24 It's just a defense, it's just an effort to reduce the Trustee's damages. We would say that by  
25 asserting that as a setoff, we're State Court lawyers, you know, we shouldn't have called it a  
26 "setoff," we should have called it "recoupment" but we did not transform this case into a core  
27 proceeding. So I've kind of gone down this rabbit hole of core, non-core that you wanted to  
28 address separately, and I've only done it in the context of demotion to compel arbitration.



1 One of the responses is “well even if it’s true that there’s an arbitration clause and even if it’s  
2 true that it would otherwise apply” you have discretion not to apply it here under this line of  
3 cases that you can’t fundament...order arbitration in a way that would be inconsistent with the  
4 fundamental purposes of the Bankruptcy Code. And the first step in that analysis is “is it core  
5 or non-core?” and if it’s non-core, the law in the 9th Circuit is there is no discretion not to  
6 order bank...arbitration. So our position is, this is not a core proceeding, it’s clearly a non-  
7 core proceeding. There is...it’s State Law claims pre-petition conduct, we are not asserting a  
8 claim against you. We are not asserting a setoff from a different transaction than you are  
9 suing on. We are simply defending ourselves and saying “If you got the money, it’s not fair  
10 that we give it to you a second time.” I’ve gone well beyond your five minutes, Your Honor.

11 JUDGE CORBIT: I hate to say.

12 RALPH CROMWELL: But if I’ve answered your questions, maybe this is the place to wrap  
13 it up. For better or for worse, the Debtor’s partner put an arbitration clause in these Token  
14 Purchase Agreements, providing for arbitration in Singapore in what clearly was going to be  
15 an international transaction, where they are selling tokens to people all over the world. And  
16 the theory in the complaint is we, Perkins Coie, are liable to the Debtor because we breached  
17 the Token Purchase Agreement, we breached the escrow provision in the Token Purchase  
18 Agreement, and all we are saying is, fine, if that’s your theory, then we are entitled to avail  
19 ourselves of that arbitration provision in that same Token Purchase Agreement. Thank you.

20 JUDGE CORBIT: Thank you. Ms. Egan.

21 PAMELA EGAN: Thank you, Your Honor.

22 JUDGE CORBIT: And let me say, I will let you...you know, the...you have your motions  
23 coming up, too. I’m going to hear from you on those. If, as with Mr. Cromwell, these various  
24 motions your arguments bleed together, I understand that. But what I’d like to hear from you  
25 at this point is not your motion to strike or not your motion to determine that it’s core, but  
26 dealing with the motion to arbitrate.

27 PAMELA EGAN: Thank you, Your Honor. One of the things that I admire about Mr.

28 Cromwell is his ability to draw a picture very vividly, whether it’s the correct picture or not, I



1 don't agree that he has the correct picture. We're not suing on the Token Purchase  
2 Agreement. Katrina Arden asked Lowell Ness if he...if Perkins Coie could serve as the  
3 escrow for the ICL. He said "yes". He issued what he called a "vanilla retainer letter" for  
4 Giga Watt Singapore in order to access the IOLTA trust account, which is where attorneys  
5 who serve as escrow are supposed to put the escrow money. And there's a lot of evidence  
6 of the escrow agreement and the terms of the escrow agreement, including the website where  
7 Lowell Ness and Perkins Coie are saying "We're going to hold this money in escrow". And  
8 statements of the token holders and the Token Purchase Agreement is evidence of the...

9 JUDGE CORBIT: You mentioned something...

10 PAMELA EGAN: [inaudible]

11 JUDGE CORBIT: And I've read the Token Purchase Agreements, I've read the white paper,  
12 I've read the complaint, I've read the answer. You're talking about, was an engagement letter  
13 or something that Perkins issued?

14 PAMELA EGAN: Yes. Yes.

15 JUDGE CORBIT: Where is that in the record?

16 PAMELA EGAN: Where is the...well, it's alleged in the complaint.

17 JUDGE CORBIT: Okay.

18 PAMELA EGAN: I don't...it's not attached to any of the pleadings. It's alleged and  
19 described in the complaint.

20 JUDGE CORBIT: Okay. And give me your shorthand description of what that is. You say  
21 this is the engagement letter. Is that what you describe this as?

22 PAMELA EGAN: Yes. Well, yes, it's a very short engagement letter that does not have an  
23 arbitration clause that states untruthfully that Perkins Coie will provide corporate advice to  
24 Giga Watt Singapore. And there's an email from Lowell Ness where he says "I'll open or I'll  
25 issue a vanilla retainer letter in order to access the account at Perkins Coie." That's the  
26 writing that we have. And Katrina Arden, this is all in the complaint, Katrina Arden followed  
27 up to Mr. Ness' assistant, saying "Is there going to be any writing about the terms of the  
28 withdrawal?" and there's just no answer. Mr. Ness shows he wanted a vanilla retainer letter.

1 We don't know why, but that's why we don't have a written agreement, but we have a lot of  
2 evidence. And with respect to damages, Giga Watt's damages are not simply that there was a  
3 promise to the token purchase agree...holders that the money would be held in escrow. When  
4 that money...that...well it destroyed all...it destroyed the enhan...it destroyed Giga Watt  
5 when the escrow agreement was completely hollowed out, and Giga Watt had not built the  
6 construction that it had said it would try to, but it has a lot of hedges about the scheduling.  
7 And Giga Watt didn't want to be on the hook if it didn't finish the construction. David  
8 Carlson took care of that, that money would have to stay in escrow and the token holders  
9 would get power or a refund. And by feeding the money as if it were not held in escrow, that  
10 money was not available. And Giga Watt was making promises, we'll have...what they  
11 wanted to make sure that if they can't finish the construction, they won't have token holders  
12 coming at them for the money and...because the money had been siphoned out. And with  
13 respect to all the money went to Giga Watt, when the money...when the first...the first half of  
14 the money was siphoned off to Giga Watt Singapore. Now if that money...if Giga Watt  
15 received any money before it had finished the construction from Giga Watt Singapore, that  
16 money could have come from all this other money that Giga Watt Singapore was making  
17 selling miners. You know, we have add those in. This is a \$50 million dollar capital raise  
18 that they made, only half of which went through the escrow. So if Giga Watt was being lent  
19 money in order to do the building, and it was...and they were getting money than they had  
20 megawatts, that wasn't the tell to Giga Watt that the money was coming from escrow.  
21 That...it could have been something from the miner money. So anyway, I just wanted to kind  
22 of...I wanted to reset that table. We're not suing on the Token Purchase Agreement. The  
23 Token Purchase Agreement is evidence of the terms of the escrow and also...well, that's what  
24 it is. And with respect to arbitration, the Motion to Compel Arbitration stumbles on the  
25 threshold of contract formation. There is a fatal contract formation defect under either the...I  
26 call it the email Token Purchase Agreement, the one where Katrina Arden sent it and said  
27 "Here is an agreement that would be put on the website". There are more than three  
28 hundred...less than three hundred and fifty claims filed by token holders in this case. Twelve

1 of them have Token Purchase Agreements attached, but they're not the email Token Purchase  
2 Agreement, it's the...what I call the Glasscock Token Purchase Agreement. No one has  
3 presented to us the...an email Token Purchase Agreement that has been signed, executed,  
4 entered into, performed. Even if the email from Katrina Arden to Lowell Ness said, which it  
5 doesn't, "this is the final Token Purchase Agreement that will be entered into by the parties".  
6 Even that, and it doesn't say that, even that doesn't show it was ever entered into. We have  
7 no evidence that that agreement was ever entered into. And a threshold question under all  
8 arbitration is that there is an enforceable arbitration agreement. And the email TPA does not  
9 meet that requirement. That's the end of that issue.

10 JUDGE CORBIT: Okay, let me ask you...

11 PAMELA EGAN: [inaudible] doesn't...yeah.

12 JUDGE CORBIT: Okay, there's one token person...purchase agreement. I think it's the  
13 Glasscock one.

14 PAMELA EGAN: Yes.

15 JUDGE CORBIT: That shows electronic signatures on both sides.

16 PAMELA EGAN: That's right.

17 JUDGE CORBIT: So...

18 PAMELA EGAN: That's right.

19 JUDGE CORBIT: So why don't we have...I mean, you say...you said there was none. But  
20 is there one? I mean...

21 PAMELA EGAN: Well, there's twelve. There's twelve of the Glasscock Token Purchase  
22 Agreements, and those are different, Your Honor. They have different language. They have  
23 different arbitration clauses. And that's very important. The email TPA has a pretty standard  
24 one that looks like a good lawyer went...it looks like a good lawyer went over the Glasscock  
25 TPA and fixed the arbitration clause, so that it wasn't infinite. But we have no evidence that  
26 anyone ever entered into that agreement, and therefore, there's no basis for enforcing that  
27 arbitration clause. And the e...and the Glasscock TPA, which is attached as Exhibit 1 to Mr.  
28 Cromwell's Declaration, which is ECF 43, that provision provides for arbitration of any

1 disputes. And “disputes” as defined in the agreement as “any demand, any claim for relief  
2 between those two parties”. That is a classic infinite arbitration clause because any disputes,  
3 so one party to the agreement runs over the other party sixty years after the agreement is  
4 entered into, after the tokens have already expired, the survivors of the victim sue, and the  
5 Giga Watt Singapore responds it has to be arbitrated because it says “any dispute” between  
6 the parties. The 9th Circuit has already addressed this issue. And there’s a split in the Circuit  
7 on how this infinite clause analysis is conducted. Mr. Cromwell with Perkins Coie wrote in  
8 its brief that “well, yeah, sure if you draw it out hypothetically that far, that could be...that’s  
9 absurd that, you know, sixty-five years there’s a car accident, and that has to be arbitrated in  
10 Singapore. That’s absurd. But under these facts, it’s not absurd. In the 4th Circuit, Mr.  
11 Cromwell might have won that point. But the 9th Circuit has rejected that approach, and the  
12 9th Circuit says, “look if there’s an agreement that you’re reading and it leads to absurd  
13 results, no one has entered into that agreement, that is not an enforceable agreement in the 9th  
14 Circuit” and therefore, under the Glasscock TPA, which has been entered into, the clause is  
15 not enforceable. And the very first element of compelling arbitration is to have an  
16 enforceable agreement. Now in their brief, Perkins Coie argues that “well there’s some  
17 limiting language elsewhere in the agreement...elsewhere in that paragraph, it’s Paragraph  
18 15a”. And for example, they waive the right to go to court with respect to any disputes,  
19 capital “D” relating to or arising from the agreement. Well that language is missing from the  
20 sentence regarding arbitration. And Mr. Cromwell would have the Court copy the limiting  
21 language from one sentence and paste it into this section. But courts don’t rewrite  
22 agreements, they interpret them. And when parties use language in one place, limiting  
23 language, and then they don’t use it in another place, the Court is entitled, it’s reasonable to  
24 infer because they didn’t want it there. And that is...and it’s not there because somebody got  
25 kind of clever by half and thought “well we’re just going to make it as broad as possible” and  
26 in some circuits maybe that would have worked like in the 4th Circuit, but not in the 9th  
27 Circuit. And so that’s why there is no enforceable agreement, a necessary element of the  
28 motion to compel arbitration has not been met. And with respect to the fourth element, which

1 is whether or not Giga Watt Singapore is a sham or not, I think there's a lot of evidence  
2 that...there's something very wrong with Giga Watt Singapore in that there's not a mechanic  
3 in rural Russia who's listed in the paperwork that was sent to the FCC. And so as of 2018 a  
4 guy named Sergey Pushencha up on the Dawn River is the director and member of Giga Watt  
5 Singapore, but we've never heard from him. I don't think we have to spend a lot of time on  
6 whether or not Giga Watt is a...I mean, I don't know if it's...you know, it incorporated in  
7 Singapore. But where is Mr. Pushencha? And who is Marina Mehaluta who was presented as  
8 the director and now her email says "Munez"? And they've fled, they've vanished, showing  
9 that they...I think we can draw the [inaudible] that they never intended to keep their promises,  
10 otherwise, they'd be here. Now Mr. Kuzenny pops in and pops out and files things like if a  
11 trustee is appointed the Russian team, which is what Giga Watt Singapore is. You know, we  
12 called it Giga Watt Singapore as a label. We've heard the Russian team mentioned many  
13 times, that's the Russian team. So, but the first element is the key there, and it has not been  
14 met. Now then, we also go to the alternative analysis at the Court's discretion. Now our  
15 position is that there's no authority to compel arbitration because there's no arbitration clause.  
16 One was not executed, and the other is infinite. But putting that aside, if the matter is core  
17 and if the Court finds an inherent conflict between arbitration and the purposes of the  
18 Bankruptcy Code, then the Court has discretion on whether or not to compel arbitration. The  
19 core analysis, and this is where I think we can talk about the core analysis, is...it's...all you  
20 have to find is that it's statutorily core, not constitutionally core. In the withdrawal analysis, a  
21 matter has to be constitutionally core to count because withdrawal deals with finality. It's...if  
22 the issue is constitutionally core, then there's no de novo review, the Court can enter final  
23 judgment. If it's not constitutionally core, then the Court's decision is subject to de novo  
24 review and therefore, that creates another layer. And how does that effect the efficiency  
25 analysis? And because the efficiencies are so overwhelmingly in favor of the case being here,  
26 that's not sufficient. But the...for arbitration purposes, it only matters whether or not it's  
27 statutorily core. And they're...Mr. Cromwell is not accurately describing Perkins Coie's  
28 affirmative defenses. And it's Affirmative Defense Number 12, as Mr. Waldron is trumping

up liability against his own debtor in order to line his own pockets and that the attorneys are working with him in order to line their own pockets. Well, that allegation arises in bankruptcy. That's both statutorily and constitutionally core. It's statutorily core under 157(b)(2)(A) the very first one because it's the administration of the bankruptcy estate. And the offset claim is not simply "you got the money"...I...that's fine that would be fine if that's what they said. But what they really say...they did say that. But they also said, Perkins Coie also said that Plaintiff is liable to Perkins Coie for quote "any damages caused to Perkins Coie...any damages caused to Perkins Coie by Giga Watt Singapore in the course of the Giga Watt project" and that's adver...that's Affirmative Defense Number 2. And there is what...what Perkins Coie is saying is "We have done nothing wrong, we have not acted unreasonably. You have acted unreasonably. You, Mr. Waldron, you didn't do well with the case and now you're trying to shake down the deep pocket and you're trying to enrich yourself at the detriment of the Debtor, unjust enrichment and that's improper, and we acted reasonably in following the directions of our client. And if those directions were wrong, that's your fault because it came from your partner in the Giga Watt project. And so this isn't about our wrongful conduct. This is about your wrongful conduct." That is a global descent to seize the ground, to seize the narrative of what happened. That's what...that's what Mr. Cromwell is skillfully doing with his associate and his partners. And that makes the matter core because the Court has to find out...has to discern which is it? Is it Mr. Waldron and his professionals who were gold bricking through the case and now are gold digging? Or...and Perkins Coie acted reasonably and followed the directions and if Giga Watt Singapore was engage...if Andrey Kuzenny was engaging in fraud, again, and giving us wrongful, that's on you and you owe us. That's core. And so then the question becomes, now that we've decided that its core, whether or not there is an inherent conflict. And so, please excuse me [inaudible], whether there's an inherent conflict. And there...let's go back to the introductions by Perkins Coie's counsel, which is we've got parties from twenty-four countries, I think there's twenty-four, from all over the world. And what we have in the Bankruptcy Court, key purposes of the bankruptcy court is to avoid piecemeal litigation and

1 to centralize disputes regarding the Debtor's obligations and it's rights in one setting. That's  
2 the superpower of bankruptcy. That is unique of a bankruptcy court and that's one of the  
3 purposes of the bankruptcy court. And we have token holders who have filed claims against  
4 Giga Watt, and those claims are well, you know, are, you know, "we never got...we never got  
5 power and we never got money" by some of the token holders. Other token holders like Jun  
6 Dam, he says that his tokens worked great. He made \$140,000 on his tokens. He put a  
7 million dollars in, he got a \$140,000 out, and then in mid-January of 2019, I think people  
8 might forget that the Debtor was operating when it filed, and it continued to operate. It filed  
9 in...on November 19th...November, December, half of January it was operating. Mr. Dam  
10 was damaged when Giga Watt crashed. Now, some of those...those token holders' claims  
11 against Giga Watt are always going to be here, they're always going to be in this Court  
12 because they're core, they're constitutionally core, and that's what this Court does. There  
13 findings that this Court can make on those...on those...on those claims. What were the terms  
14 of the escrow? What was the promise to you? Were you supposed to get...was it power  
15 refunds or is it as Perkins Coie says, "no Giga Watt Singapore was allowed to access the  
16 money right away"? Well, those issue will be decided in the claims allowance process, and  
17 they would be decided in an arbitration between Giga Watt and Perkins Coie. We could have  
18 inconsistent results on facts. We could have different legal conclusions, and that inherently  
19 conflicts with the whole point of bankruptcy, which to centralize these disputes and avoid  
20 piecemeal litigation. And if this case is sent to arbitration, then I think that we can be fairly  
21 confident that the token holders claims once they get the right plaintiff, I think it's important  
22 to note, Your Honor, that Jun Dam is the lead plaintiff in the case that's pending in the  
23 District Court, his tokens worked, he got the power, he wasn't directly affected by the escrow.  
24 Mr. Waldron and I are finalizing our analysis of our entitlements, the Trustee's entitlements,  
25 in order to show cause why that action doesn't violate the automatic stay. It's a copycat  
26 lawsuit. But if...but there are token holders out there who will have direct claims against  
27 Perkins Coie. And there's a class action waiver in the...at least in the Glasscock...the twelve  
28 Glasscock TPAs. So what are we going to have all three hundred and forty in different



1 arbitrations? That inherently conflicts with bankruptcy. Bankruptcy is particularly well-  
2 suited in the like the mass tort type scenario. We saw that in the Catholic Diocese cases. I  
3 represented a committee of tenant claimants in another case down in Oakland where  
4 everybody gets to come into one forum as opposed to different panels of arbitrators in  
5 Singapore. So there's an inherent conflict there. So in...and finally, so what we have is on  
6 the Motion to Arbitrate, an essential element is missing, there is not an enforceable  
7 agreement. And then on discretion, we have the statutory coreness, we have the inherent  
8 conflict. Now in one of the papers, I think it was in the reply to the opposition to the Motion  
9 to Compel Arbitration, Perkins Coie asked for a stay while they went and looked for an  
10 agreement, an agreement that they...that had an enforceable...but under the Federal  
11 Arbitration Act, in order to get a stay under Section 3, there has to first be an enforceable  
12 agreement. They can't get a stay in order to go look for it. Then outside of the FAA, in order to  
13 get a stay, one has to show a probability of success on the merit. One doesn't get a stay so  
14 that they can go fish for evidence to give them that probability. So they're not entitled to a  
15 stay. And on all of those grounds, Your Honor, arbitration is not appropriate.

16 JUDGE CORBIT: Ms. Egan, one of my questions at the outset was whether or not you might  
17 be amending the complaint.

18 CLERK: Judge, are you on mute?

19 JUDGE CORBIT: I don't think so. Ms. Egan, can you hear me?

20 PAMELA EGAN: Yes, I can, Your Honor.

21 JUDGE CORBIT: Okay. Madam Clerk, for recording, is it better if I get a little closer to the  
22 machine? Is that better?

23 CLERK: Yeah, that's better. Thank you.

24 JUDGE CORBIT: So Ms. Egan, the question is while I have to be reviewing this arbitration  
25 motion twice, once with respect to the complaint that's been drafted and possibly with an  
26 amended complaint that might be filed. You know, again, I was wondering why is Giga Watt  
27 Singapore even a defendant? I mean is...are you going to be amending the complaint as Mr.  
28 Cromwell guessed?



1 PAMELA EGAN: I don't think so, Your Honor. I read the complaint, which Mr. Waldron  
2 and I wrote, differently than Mr. Cromwell reads it. Mr. Cromwell reads it as we're suing on  
3 the Token Purchase Agreement, but we're not. We're suing on the escrow agreement.  
4 There's a lot of evidence of the escrow agreement, some of which is the Glasscock TPA, but I  
5 don't...and then with respect to Giga Watt Singapore as a sham. Why are we suing a sham?  
6 I don't know the...I...we've come close to alleging it as a sham. There's a...there's just a lot  
7 of questions about it, and that's what I said. It's not prima facie...prima facie invalid. And so  
8 at this time, Your Honor, we're not inclined to amend the complaint.

9 JUDGE CORBIT: Okay. That...you know, I'm not...I'm just trying to get a handle on  
10 where this case is going so that I can decide the issues and not be aiming at a moving target.  
11 So Ms. Egan, you answered my question. Mr. Cromwell, it's your motion you get the last  
12 word.

13 RALPH CROMWELL: Thank you, Your Honor. I'll be...I'll be very, very brief. Rather  
14 than painting a vivid picture, I would like to just read two paragraphs from the complaint on  
15 this issue of are they alleging a breach of Token Purchase Agreement. First, Paragraph 48 on  
16 Page 19, this is the amended complaint. "Tokens were purchased through a module on Giga  
17 Watt's website, which Cryptonomos created and controlled. Using smart contracts, Giga  
18 Watt Singapore and the token holders entered into the token sales agreements, which  
19 incorporated by reference the terms of the white paper including its escrow terms." So the  
20 complaint specifically alleges that Giga Watt Singapore and the token holders entered into the  
21 token sales agreement, which is otherwise referred to as the Token Purchase Agreement.  
22 Paragraph 48 and then Paragraph 25 and 26, Paragraph 25: "Perkins Coie's breach of the  
23 escrow damaged Giga Watt." How? Paragraph 26: "Perkins Coie's breach of fiduciary duty  
24 immediately put Giga Watt in breach of the Token Purchase Agreements, which incorporated  
25 the terms of the white paper including in particular the escrow requirements." I can only take  
26 the complaint at face value, which says there were Token Purchase Agreements which were  
27 signed and that when Perkins Coie let this money out of escrow, it put the Debtor in breach of  
28 the Token Purchase Agreement, and we'd like to recover damages for that. That is suing

1 Perkins Coie for an alleged breach of the Token Purchase Agreement. And that entitles  
2 Perkins Coie to go fine if that's your theory then guess what else is in the Token Purchase  
3 Agreement, we want to arbitrate. So it's Paragraph 25 and 26, Paragraph 48. Thank you,  
4 Your Honor.

5 JUDGE CORBIT: Thank you. And Ms. Egan, you know, no further reply from you on that  
6 motion, but I do understand your argument that the Token Purchase Agreements are evidence  
7 of the escrow, but it's that the escrow...and I'm not saying that I accept that argument. I  
8 understand Mr. Cromwell's, as well, but I think you both have done a good job in explaining  
9 to me your positions and what the issue are. So now let's move to the second of the three  
10 motions. Let's deal with the Motion to Strike the Jury Demand. Ms. Egan...

11 RALPH CROMWELL: Your Honor...Your Honor, this is Ralph Cromwell. May I just  
12 interrupt to a minute to say I'm going to ask my partner, Jofrey McWilliam, to argue this. I'm  
13 just giving him a brief heads up. I'm sorry to interrupt.

14 JUDGE CORBIT: Okay, and...get my glasses on again, it's McWilliam?

15 JOFREY MCWILLIAM: Yes, Your Honor.

16 RALPH CROMWELL: McWilliam. Yes, Your Honor.

17 JUDGE CORBIT: Okay. Alright, so with respect to the Debtor's...or the Trustee's Motion  
18 to Strike the Jury Demand, I'll hear from you first, Ms. Egan, and then I'll hear from Mr.  
19 McWilliam.

20 PAMELA EGAN: Thank you, Your Honor. The Motion to Strike the Jury Demand is very  
21 much related to the Motion to Withdraw. Whether or not there's a right to a jury trial is  
22 relevant, not dispositive. If there is a right to a jury trial, withdrawal does have to occur at  
23 some point, but it effects the...but it doesn't have to happen right away. Otherwise, we would  
24 lose all of the efficiencies and all of the efficiencies of being here in the Bankruptcy Court  
25 with the Court has been exposed to the context and the facts since November of 2017. So  
26 that's the relevance. Also...

27 JUDGE CORBIT: And Ms. Egan, I think I'm recognizing that in the sense that I'm going to  
28 decide the arbitration motion first, even if later I decide that there's a right to a jury trial, and

1 it's not going to be before me, and it has to go before the District Court.

2 PAMELA EGAN: Right. So, you know, it's so intertwined with the Motion to Withdraw the  
3 Reference. I have a question, Your Honor, if you'd bear with me, please. Are we going to  
4 argue the Motion to Withdraw the Reference today in order to facilitate the Court's  
5 transmittal of information to the District Court regarding it?

6 JUDGE CORBIT: No, not today.

7 PAMELA EGAN: Oh okay. Alright. Alright, well there is no right to a jury trial in this case.  
8 The...we're suing on an escrow. An escrow is a trust, and we have the authorities in the  
9 briefs. I know the Court is always diligent and reading the briefs, so I won't belabor that  
10 point. It's a trust. Under the common law back in the courts of Westminster in 1791 when  
11 there was a breach of fiduciary duty claim against a trustee, the surcharge for damages which  
12 is perfectly entitled to exclusive...that went into the exclusive jurisdiction of the equity court,  
13 which did not have damages. And a majority of the courts back then held that you don't even  
14 have...show a lack of inadequate remedy at law. It's a trust, it's exclusive jurisdiction of the  
15 courts. The adequate remedies at law that Perkins Coie has pointed out to us are not adequate  
16 remedies at law. Money had and received is when the Defendant is holding the money, and  
17 the Defendant is not holding the money. So we would not have a money had and received.  
18 Trover is for chattels, which is, you know, it's cattle, it's stuff, and not about money,  
19 unless...unless there was specific money entrusted to somebody like spec...like that money  
20 like, you know, these euros. Not here where we're surcharging the Trustee for breach of  
21 fiduciary duty. And I pretty thoroughly I think outlined how that was in 1791 treated solely in  
22 escrow, which is why there is no right to a jury trial in this case. And I would like to point out  
23 that there's a disingenuity...disingenuousness about the...Perkins Coie's demand for a jury  
24 trial. On the one hand, they ask for arbitration, no jury trial. But on the other hand they  
25 ask...you know, they demand a jury trial. But on the other hand, they ask for arbitration. On  
26 the one hand, they demand arbitration, but on the other hand they would rely on the Glasscock  
27 TPA, which has a waiver of jury trial. And so they're going back and forth on this, and the  
28 single thread between all of that is they demand a jury trial when they want to withdraw the

1 reference, and then, you know, they don't care about the jury trial when they want to go to  
2 arbitration, which smacks of an "anywhere but here" campaign. Its smacks of forum  
3 shopping. That's our...and if there is a right to a jury trial with respect to the withdrawal, all  
4 that that means is that there would be de novo review because the efficiencies, I call them  
5 the...the four elements are EFUD, EDUF, efficiency, delay, uniformity, and forum shopping.  
6 It just means that there would be a de novo review, which in light of the efficiencies and the  
7 forum shopping is insufficient to outweigh. So that's all I have, Your Honor, on the jury trial  
8 issue.

9 JUDGE CORBIT: I do have a question for you, Ms. Egan. In connection with the de novo  
10 review, okay, if this case is not core and there is no right to a jury trial, the trial takes place  
11 before me, and then I make a report and recommendation up to the District Court. That's a  
12 process that everybody's familiar with. However, if there's a right to a jury trial, this Court  
13 can conduct a jury trial if the parties consent. But if Perkins Coie doesn't consent, doesn't  
14 that mean that I should just send it upstairs? Now, I have to tell you this, varying levels of  
15 concern that I have in this. You know, there is with all the faces I see here and all the people  
16 that have been in my court trying disputes, there is some sort of locus of interest in Eastern  
17 Washington or in the United States. People knew that they were investing in Wenatchee.  
18 They knew this was there. People have all been here in this court, and all the attorneys are  
19 already here. Perkins Coie is in this state. You know, there's all of that. That deals with the  
20 arbitration clause. As for whether there's a right to a jury trial and whether I should try this  
21 case or not, I'm not so worried about this case going to Judge Rice or Judge...you know, one  
22 of the other district judges here and they conduct a jury trial because, you know, it's...they're  
23 about a hundred yards away from me. You know the forum is not that far off, and they're all  
24 excellent judges. I guess I do wonder why the Plaintiff...or the Defendant in this case would  
25 want a jury. I would think that they would rather try this case before a federal district judge  
26 or a bankruptcy judge. But I'm rambling and if you were the judge, Ms. Egan, you could tell  
27 me to wrap it up. What I'm trying to get to here is that if there is a right to a jury trial, I don't  
28 see this going as a report and recommendation. If it's going to be a judge trial, you know, the

1 report and recommendation is...you have the trial you have all the...then there's a de novo  
2 review, but there's not a new trial. But if at some point during the process there has to be a  
3 jury trial, the party has a right to a jury trial, it seems to me if it's not going to be conducted  
4 here because people don't consent, then it needs to go to the District Court.

5 PAMELA EGAN: Your Honor, may I say something on that?

6 JUDGE CORBIT: Yes.

7 PAMELA EGAN: Thank you. I...yes, of course. But then the question becomes one of  
8 timing. Of when does it go over, when does it go upstairs to the request [inaudible] a hundred  
9 yards away to the District Court? There's a lot of water that can flow under the bridge  
10 between now and when this case is ready for trial. Maybe they'll be a 12(b)(6), he's raised it  
11 as an affirmative defense. Maybe we'll be moving for summary judgment. There were will a  
12 lot of discovery issues. I hope that we can work them out and all of that can be decided here  
13 without the delay and the inefficiency. So I think that if there is a right to a jury trial, that  
14 then becomes a question of timing.

15 JUDGE CORBIT: And I understand that, and I think that that's the best analogy would be at  
16 that point, you know, the Bankruptcy Court is a separate court, and we have core jurisdiction  
17 to do many things. And frankly the withdrawal of the reference issue and what's not core  
18 happens maybe one out of five thousand cases. It's very small, but it can happen. But when  
19 it does happen, it's...I think the situation is more analogous to a magistrate judge and a  
20 district court judge. A magistrate judge does decide a lot of issues, discovery issues, may  
21 decide arbitration issues and so forth, even though the magistrate judge may not ultimately, if  
22 people don't consent, the magistrate judge may not conduct the jury trial. I think that's...it  
23 would be somewhat similar here. So Ms. Egan, the short answer is I understand your timing  
24 question, and if I didn't think that was an issue, I wouldn't be hearing the arbitration issue  
25 first.

26 PAMELA EGAN: Understood.

27 JUDGE CORBIT: Okay. Mr. McWilliam, it's your turn to respond to the Motion...

28 JOFREY MCWILLIAM: Thank you, Your Honor. Thank you, Your Honor. I'll try to be

1 brief. First of all, I just wanted to address very briefly this question of disingenuity. There is  
2 no disingenuity. Parties are allowed to plead and argue any alternative.

3 JUDGE CORBIT: I understand that.

4 JOFREY MCWILLIAM: Okay. I just wanted to address that very briefly. So the right to  
5 jury trial is a two pronged analysis. First prong, the question is is the claim legal or equitable?  
6 The second prong is is the relief requested legal or equitable? And that's an either/or analysis.

7 If either one of those is answered that the claim is legal or the relief is legal, then there's a  
8 right to a jury trial. And the Supreme Court's been very, very clear that this is a substance  
9 over semantics in that you have to very carefully review this issue because it is a

10 constitutional right. And if there's one thing addressing this first element, is the claim legal?

11 If there's one thing that the argument this afternoon has made clear, it is that the existence of  
12 an escrow agreement, what it's terms are, whether it is enforceable against Perkins Coie, and  
13 whether performance under it, under those terms were breached is at the core of this case.

14 This case turns on that issue in large part. That is the first and foremost issue and that issue,

15 it...does a contract exist, what are the terms of the contract, who are the parties to the

16 contract, who can enforce that contract, did a party to the contract breach it's terms? That is a  
17 classic legal issue. And we've cited the case law for that, Your Honor, but it is clear under

18 U.S. Supreme Court precedent that when you're talking about whether a contract exists and  
19 what its terms are, that's a legal issue, that entitles you to a jury trial, and that's what we have

20 here. And I was...in terms of this issue about whether an escrow is a trust, does it have

21 fiduciary duties, there are many agency relationships that give rise to fiduciary obligations

22 that are...that give rise to trust obligations. That doesn't mean a trust has been created and a

23 trust...an escrow is not a trust. Even though an escrow may have fiduciary obligations, even

24 though there may be trust obligations, it is not a trust, and we do not fall under trust law. And

25 I can...I can go into that distinction between an escrow and a trust a little bit if that would be

26 helpful. But I also want to point the Court to the *Dairy Queen* case that we cited in our

27 briefings, as well as the *DePinto* case. The *Dairy Queen* case is the U.S. Supreme Court case.

28 The *DePinto* case is a 9th Circuit case, and those cases are really instructive here. In the

1 *Dairy Queen* case, the plaintiff asserted a claim for an accounting. That is classically an  
2 equitable claim, but it turned on the existence of the contract and what the terms of the  
3 contract were. And the Court said doesn't matter that you're deriving or bringing an  
4 accounting claim derived from a contract, you first have to determine is there a contract, what  
5 it's terms are, whether they were breached. That's a...that is a legal issue. It's a jury  
6 question. That's what the *Dairy Queen* court holds. So, regardless of whether there may be  
7 fiduciary obligations as part of an escrow agent's duties, regardless of whether they may have  
8 trust obligations, the first and foremost question is what is the contract, what are its terms?  
9 And that is a legal issue. And the case law and this gets into the distinction a little bit between  
10 escrow and trust, the case law on escrow is very, very clear that your fiduciary obligations,  
11 your trust obligations, whatever they may be, they are limited and defined by the contract  
12 terms. So the contract is core. And if you look at the case law we cite, an escrow relationship  
13 is an agency relationship. It is a contractual agency relationship, and it is very distinct from a  
14 trust or being a trustee. When you get into the trust law, you have essentially a trustor gifting  
15 money or property to a beneficiary, and title or ownership is conveyed to a trustee who then  
16 has a lot of discretion to manage it, to invest it, and to then give the proceeds to the  
17 beneficiary. And that is the trust relationship. The beneficiary at all times has a beneficial  
18 interest in the property that is owned by the trustee, and that is not what an escrow is. An  
19 escrow merely facilitates a commercial transaction, it's contractual, the two principals...the  
20 two parties that are doing the transaction principals. The escrow is an agent, the escrow  
21 agent's...the escrow agent's obligations change over time, depending on what is happening  
22 with the transaction and whether conditions of escrow have been met. And that is another  
23 point to be made here, which is the Trustee is not arguing that it ever had a beneficial interest  
24 in the funds that were allegedly improperly disbursed. The Trustee is arguing that the token  
25 purchasers at all times had that beneficial interest. Why? Because the Trustee alleges the  
26 contractual terms of the escrow had not yet been met and so there was no right or obligation  
27 to transfer that money or disburse it to Giga Watt Singapore. And so at all times, we're  
28 talking about funds that according to the Trustee's allegations belong to the token purchasers.



1 So the Trustee is not a beneficiary of those funds and cannot sue in trust for a breach of trust  
2 to funds in which it never had a beneficial interest, and that's the Trustees whole theory. So  
3 those are the distinctions between escrow and trust. Escrow is a contractual relationship. The  
4 fundamental issue here is a contractual issue, and that is a legal issue that is a jury question.  
5 And the Supreme Court in *Dairy Queen* and the 9th Circuit in *DePinto* really illustrate that  
6 point. So this...so the first prong is met here. The legal issue, the jury question, that alone  
7 entitled Perkins Coie and Mr. Ness to a jury trial. Secondly, and somewhat connected to this  
8 issue of who had the beneficial interest in the funds that were allegedly improperly disbursed  
9 is the second prong of the analysis which is is the relief sought legal or equitable? And the  
10 Trustee, again, is not claiming that it ever...that the Debtor ever had a beneficial interest in  
11 the funds that were allegedly improperly disbursed. It's quite the opposite. The Trustee is  
12 saying those funds should never have been disbursed. They should go back to the token  
13 purchasers who never got power. And if that is the case, then what the Trustee is really  
14 alleging, and I think this is what the complaint says, is if we are liable to the token purchasers  
15 for damages caused by this arrangement, this escrow, however their liability might occur if  
16 the Debtor is liable to the token purchasers, then that liability is compensable in money  
17 damages by Perkins. We should be able to sue Perkins for money damages if we are liable to  
18 token purchasers. That's what the claim is here. It is a claim...classic claim for  
19 compensatory damages. It's almost like the contribution claim. If we're liable to the token  
20 purchasers, then you're liable to us. Pay us damages. So the second prong is also met. And  
21 if you look at the Supreme Court analysis, the second prong is more important. You can call  
22 you claim whatever you want it. If you're looking for compensatory damages, there's a jury  
23 trial right. Does Your Honor have any questions?

24 JUDGE CORBIT: No, thank you. I'll read those cases, again. Ms. Egan, this is your motion,  
25 you can have the last word.

26 PAMELA EGAN: Thank you, Your Honor. The Washington Supreme Court in the *Estate of*  
27 *Jordan* said quote "We emphasize that our holding is based on the special trust relationship  
28 that exists between an escrow company and its trust beneficiaries. The escrow agent held the



1 escrow funds in trust for the benefit of its clients. The Trustee owes undivided loyalties. And  
2 then we have the *Radich* case referring to an escrow agent as a trustee for the parties, and  
3 that's alleged in the complaint. Andrey Kuzenny would refer to Perkins Coie as the trustee.  
4 So an escrow is a trust. Back in 1791, you couldn't sue on an escrow for money because it  
5 didn't exist. You would have to sue under a trust theory. The fact that an escrow agent only  
6 has to follow the directions just means that that's the duty of the escrow is to follow the  
7 directions...the escrow agent, the escrow hold 'em, the escrow trustee, they're called all of  
8 those things under the case law. That they have to follow those directions. Well that's the  
9 same with every trust. Every trust starts with an agreement. Hey, will you hold this for me?  
10 And some trustees have broad discretion, some trustees have very narrow discretion. And  
11 it's...I respectfully disagree with my colleague, Mr. McWilliam, that it's either the legal...the  
12 claim is legal or the remedy is legal. That's incorrect. The...there are cases where the court  
13 is looking at something like a statutory right that, like under *Arisa* for example this comes up,  
14 and they don't know if there's a right to a jury trial or not. The statutory right, of course, did  
15 not exist in the courts of Westminster in 1791. So the court backed in, they tried to back in to  
16 what it is. And when they're backing into what it is, they look at the claim and they look at  
17 the remedy, and in that scenario, the remedy has more weight than the remedy. But this is a  
18 different situation. This is a classic trust theory. You know, Black's Law Dictionary, "an  
19 escrow is an account held on trust". I don't think that can be seriously argued. And surcharge  
20 is...we didn't call it surcharge. That's a...you know, damages...if the trustee dissipates the  
21 funds, the beneficiary has a right against that trustee for breach of fiduciary duty, and there is  
22 no jury right for that. The court of equity had the power, it's called "make whole relief".  
23 They had those rights. Justice Storey talks about that quite a bit in a briefed oral of that. So  
24 that is what we used to call in law school "lack letter law" where it was just those are the  
25 rules. And so, this is an action on a trust, and there is no right to a jury trial.

26 JUDGE CORBIT: Thank you. Again, the Court is new to having Zoom hearings. After  
27 arguing almost two hours, I would give everybody a little bit of a break, and I think I'm going  
28 to do that, too. But as opposed to logging in and logging out, I have on my screen it says

1 3:11, let's come back at 3:15, just four minutes. Go stretch your legs, and then we'll hear,  
2 Ms. Egan, your motion to determine that this matter is core. But again, just a four-minute  
3 break to stretch our legs, get a drink of water if you want one.

4 CLERK: Okay, we're off the record.

5 [break 3:13:25pm to 3:20:28pm]

6 CLERK: We're back on the record.

7 JUDGE CORBIT: Ms. Egan?

8 PAMELA EGAN: Thank you, Your Honor.

9 JUDGE CORBIT: I'll hear from you with respect to Motion for Determination that the  
10 proceeding is core.

11 PAMELA EGAN: Thank you, Your Honor. In Affirmative Defense Number 12, Perkins  
12 Coie makes the allegation that we've mentioned before that the Trustee is just...didn't do well  
13 in the bankruptcy case and is now improperly contriving liability against the Debtor so that he  
14 can grab his three percent of distributions and make sure that his attorneys are paid. That's an  
15 effort by very skilled lawyers to seize the grounds, to seize the battle grounds, set the  
16 narrative. And the other affirmative defense is also...it's to seize the grounds, set the  
17 narrative, be in control of the field on which we're all talking, which is that Perkins Coie  
18 didn't do anything wrong, Perkins Coie acted reasonably, it received instructions from its  
19 client with what to do with respect to this money, and if Giga Watt Singapore did anything  
20 "wrongful" was the term used, then you're the ones liable. So those aren't the kinds of  
21 defenses that can just be disaggregated and set off to the side, that's the gestalt as it were, it's  
22 the entire case. We didn't do anything wrong. You had an unsuccessful case. You're doing  
23 something improper. Your partner may have done something improper. If we're damaged by  
24 this, you're going to be reimburse us. The claim against the Trustee and his professionals is  
25 constitutionally core. It arises in the bankruptcy case. No other court can decide those issues,  
26 and that's not just a throw away. Maya Angelou once said, "When people show you who they  
27 are, believe them". They've made this aggressive, assertive, affirmative defense. You're the  
28 bad guy, we're not the bad guys. It's constitutionally core. It makes the entire case. It can't

1 be that both are true. It's an either/or. And if we know that the...that there was a trust, and it  
2 was breached, or if we know that Mr...you know, we would never this, but just hypothetically  
3 [inaudible] that the Trustee is just contriving things to unjustly enrich himself, then it's not  
4 that Perkins Coie assumed an obligation, which would have benefited Giga Watt by making  
5 sure that if it didn't meet its construction schedule like it didn't, then they could just pay the  
6 token holders instead of being caught with people with no power and no tokens. So those  
7 defenses, that aggressiveness, that seizing the ground as it were, well okay, if that's the  
8 ground that we're going to be on, that's core. And that's why this case is core and the courts  
9 recognize that. And so that's why this case is now core. The offset claim, which is if Giga  
10 Watt Singapore did something wrong and you know we...you know and we're  
11 [inaudible]...and we, Perkins Coie, are harmed by that, that's a claim, which is core. And it's  
12 a secured claim because it brought the offset. And these aren't just like these little one offs.  
13 It's either/or. And the courts recognize that when that happens the whole case becomes core.  
14 Thank you, Your Honor.

15 JUDGE CORBIT: Thank you. Mr. Cromwell, Mr. McWilliam, whichever one of you wants  
16 to argue, the floor is yours.

17 JOFREY MCWILLIAM: It's going to be Mr. McWilliam. Thank you, Your Honor. I think  
18 I'd like start by just emphasizing that the Defendants have not filed a proof of claim. The  
19 Defendants have not counterclaimed. The Defendants have not requested affirmative relief of  
20 any kind. Rather, they had simply said that whatever moneys you got, you cannot recover  
21 twice from Perkins Coie. And by the way under the same state law that governs your claim  
22 against Perkins Coie, you have a duty to mitigate. Those are the two defenses. You can't  
23 recover twice. We've called it setoff, it's really recoupment in this situation and failure to  
24 mitigate. Those are state law defenses that do not seek affirmative relief of any kind, that  
25 merely seek to reduce or abate the damages that are sought from Perkins by the Trustee and  
26 that arise out of the exact same circumstances on which the Trustee is suing Perkins Coie.  
27 And this issue is directly controlled by the 9th Circuit's decision in *Newberry*. And Mr.  
28 Cromwell talked about it a fair amount already, but basically, and I'll just reiterate very

1 briefly, if the defense arises out of the same transaction, it is not...it does not invoke the  
2 claims allowance process, it does not invoke the Bankruptcy Court's equitable jurisdiction, it  
3 is not a preference, it is not a setoff under Subsection 5553 of Title 11, there is no automatic  
4 stay applicable here. I mean, that is...that is if you read *Newberry*, that is the precise holding  
5 on all of those issues, and that is all that has been done here. If this matter is tried in the  
6 District Court or jury, if this matter is tried to arbitration, there's no bankruptcy issue that is  
7 going to be decided by any of these decision makers or these fact finders. The issue is going  
8 to be under state law principles, are you seeking to recover money that you already got?  
9 Under state law principles, did you meet your duty to mitigate your damages? That's all that  
10 is being...

11 JUDGE CORBIT: Yeah, let me ask you a question. This one...this issue, the consequences  
12 of this motion the three...well that may have the least amount of consequences in the sense is  
13 that if I determine that there was no right to arbitrate and there was no right to a jury trial, the  
14 dif...what happens is if this is not core, I try the case, and I give a report to the District Court.  
15 The District Court's not likely to conduct another trial, they do a de novo review and look at  
16 it. On the other hand, if I determine that it's core, I conduct the case. And if you don't like it,  
17 you appeal to the District Court. So you know, the procedure that will be followed, it's  
18 probably, do you agree with me it's probably not going to be all that much different?

19 JOFREY MCWILLIAM: Your Honor, if you are asking for me to...if I understand the issue,  
20 I think you're asking me a question of bankruptcy law? And I perhaps would ask Mr.  
21 Munding to weigh in because I'm not a bankruptcy lawyer.

22 JUDGE CORBIT: Treat that as a comment because this motion, whether it's core or not,  
23 does have consequence. Whether the consequence is as big as some of the other motions, it  
24 doesn't matter. This motion does have consequence, so you can just treat what I stated as a  
25 comment. Go ahead, Mr. McWilliam.

26 JOFREY MCWILLIAM: Well, I think I've really covered what I wanted to say, which really  
27 is that 9th Circuit law is very, very clear that if all you're trying to do is to reduce or abate the  
28 damages that the Trustee is asserting against you or seeking to recover against you, then this

1 is a true defense, it does not invoke the claims allowance process. I mean, we are not asking  
2 for any relief. We are not asking for a finding that somehow there was...there has been  
3 something done in the bankruptcy that shouldn't have been done. We're not asking for any of  
4 that. The point merely with all of this, both with the setoff/recoupment defense and with the  
5 failure to mitigate defense, and I...we've tried to explain this in our briefing is the...for  
6 example, the point that you're liable to us, it was a rhetorical point. If...if...if you are  
7 claiming through your partner GW Singapore, it then...you have to take the burden of that  
8 relationship along with the benefits. So if you were liable for GW Singapore's conduct, then  
9 you...then...and that conduct is imputed to you as your partner, which is what the allegation  
10 is, well so is the benefit of that arrangement. So is the benefit of the fact that they got  
11 some...either the Debtor or GW Singapore got the money. Well, the benefit of that is  
12 imputed to you, as well. And by the way, so is the burden of GW Singapore's conduct. So  
13 it's an offsetting claim and liability, and that's all the point was. It was not asking for  
14 affirmative relief, and it's the same thing with the failure to mitigate. It's just that there is a  
15 duty under...under state law that governs these claims, potentially, we'll have to see what...I  
16 mean, depending on rulings on is their token purchase agreement enforceable and does it have  
17 a choice of law? But the issue here is can you claim or recover damages that weren't  
18 mitigated? Did you meet that duty? And that, again, is simply an effort to reduce or abate the  
19 claim damages. And under *Newberry*, that is not a core claim and does not invoke the  
20 allowance process...or, disallowance process and does not invoke equitable jurisdiction of  
21 bankruptcy. So thank you, Your Honor.

22 JUDGE CORBIT: Thank you. Ms. Egan, final remark.

23 PAMELA EGAN: Thank you, Your Honor. For my final remarks, I'd like to go back to  
24 Maya Angelou "When people show you who they are, believe them". Affirmative defenses  
25 are much broader than what's being portrayed right now. [inaudible] I expect that we go to  
26 trial, whether it be before Your Honor, whether it be in the District Court, whether it be in an  
27 arbitration, Mr. Waldron is going to be put on trial, the professionals are going to be put on  
28 trial. You're making this up, you're contriving this theory, this creative theory in order to

1 compensate for your lack of success in the case at...to the detriment of the Debtor. They  
2 don't just say...tell you to make a case, they said "contriving liability", they said "improper",  
3 and so that's seizing the ground. We're not at fault, you're at fault. And with respect to the  
4 offset and the recoupment, you know, in my...when I go for walks, I listen to lectures that I  
5 barely understand by physics professors, and they talk a lot about, oh, there's all kinds, but at  
6 a certain level the universe is homogeneous, like actually like everything in the universe is  
7 exactly the same. And so at some level, you can say "oh well it rises out of the same  
8 transaction", that doesn't make it recoupment. Recoupment it has to be like the same goods,  
9 or in *Newberry*, the facts are very convoluted. I think I laid them out pretty clearly in the  
10 brief. The plaintiff was actually suing the debtor for...the credit...was suing a party...the  
11 defendants for a claim that the plaintiff actually owed. The plaintiff owed it and yet they had  
12 the chutzpah to sue the defendant. This isn't *Newberry* recoupment. *California Cannery* is a  
13 case that's really only shapes recoupment is. It's that the same goods being back and forth.  
14 This is "yeah, you think that we're liable to you, well, we didn't do anything wrong and it was  
15 your partner who did something wrong". That's a claim, and that's core, and I won't belabor  
16 the point. But I'll just finish on the point that it's seizing the ground, it's seizing the narrative,  
17 it's what happened, and it's...the offset makes the entire...the offset is not just "we gave you  
18 money, and therefore, you know, we want to have an offset for the money that we gave you".  
19 It's much broader than that as written. And so it's...and the case laws say that when you  
20 bring an offset claim that's entangled with the entire fees, then you're here, and we're going  
21 to decide it because you're asserting a secured claim against the estate. It doesn't matter that  
22 it's only going to come out of liability. It doesn't matter that they're not, you know, that they  
23 didn't, you know, file a proof of claim. It's core and, you know, where the coreness...I want  
24 to make one final distinction because it's important. For the withdrawal purposes, one looks  
25 at constitutional coreness because it deals with finality. But for triggering this Court's  
26 discretion in arbitration, it's only statutory coreness that matters, and an offset is statutorily  
27 core because it asserts a claim. It doesn't matter that a proof of claim hasn't been filed,  
28 101(5) of 11 U.S.C. 101(5) describes a claim as "any right to payment, whether fixed,

1 contingent, reduced to judgment, disputed, undisputed, matured, unmatured,” any claim. And  
2 then certainly, you know, saying that the Trustee has contrived liability at the expense of the  
3 Debtor improperly is constitutionally core, but the...and statutorily core. And that’s an  
4 important distinction for the arbitration in terms of the Court using its discretion. And that’s  
5 all that, on behalf of the Trustee, I have to say on the issue of coreness, Your Honor.

6 JUDGE CORBIT: Okay, thank you, Ms. Egan. We started off saying that I would cut  
7 you...any of you off if I thought you were repeating yourself, you didn’t. Mr. Cromwell, Mr.  
8 McWilliam, Ms. Egan, your arguments were clear and cogent. I appreciate it. One thing I  
9 would like to do, though, with everybody on the screen is that not only do we have this  
10 litigation, but we have this case to administer. You know bankruptcies have...bankruptcy  
11 judges preside over adversary actions, and they preside over the main case. I’m not going to  
12 rule from the bench, and I don’t think you expected me to. I want to write a reasoned opinion  
13 on this, on these three issues that were raised, and I want to do so quickly, but I don’t know in  
14 the administration of this case, Mr. Waldron, Ms. Egan, if there is something, that you need  
15 this by “x” date or if there’s something that’s happening. So I’m opening it up for status  
16 conference. I would hope that I could get the arbitration motion written and decided in a  
17 couple of weeks and that maybe the other two will follow in similar timeframes. Maybe I can  
18 be a little faster than that, maybe it will take a little bit longer than that. Ms. Egan, do you  
19 think that that creates any difficulty, the Court’s suggested timing?

20 PAMELA EGAN: I don’t, Your Honor. I would like...I would like...

21 JUDGE CORBIT: I saw Mr. Waldron shake his head, no, so unless...

22 PAMELA EGAN: Okay. Okay. Okay.

23 JUDGE CORBIT: So I think there’s agreement.

24 PAMELA EGAN: [inaudible]

25 JUDGE CORBIT: Mr. Cromwell, is there any deadlines that you’re aware of that you’d like  
26 me to burn the midnight oil?

27 RALPH CROMWELL: No, Your Honor.

28 JUDGE CORBIT: Okay. I will probably burn a little bit of midnight oil anyway because I’m

1 a night owl, but I will move briskly. Mr. Munding can probably...he's had some complicated  
2 cases before me. I'm...we talked about reputations. I hope that my reputation is is that we  
3 move promptly, but in a case like this, promptly is not overnight. This is an interesting case,  
4 and you presented interesting legal issues, and you deserve a reasoned response.

5 UNKNOWN: Thank you, Your Honor.

6 JUDGE CORBIT: With that comment, Counsel, thank you for your good briefs, thank you  
7 for your clear arguments. We're adjourned.

8  
9 Signed under penalty of perjury on May 10, 2021

10  
11 

12 Signature

13  
14 Gina M. Cozza

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